

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

5

ALEXANDER YOUTH NETWORK
Employer

10

and

CASE 11-RC-06595

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

15

Petitioner

20

Ronald C. Morgan, Esq., for the Regional Office.
Charles E. Johnson, Esq., and
Jonathan C. Krisko, Esq., for the Employer.
Brad Manzollilo, Esq., for the Petitioner.

25

DECISION ON OBJECTIONS

Statement of the Case

30

WILLIAM N. CATES, Administrative Law Judge: This case was heard by me on May 3, 2005¹ in Charlotte, North Carolina. The hearing addressed numerous objections to the election conducted on March 31.

35

I. Background

40

Alexander Youth Network, herein the Employer, and United Steelworkers of America, AFL-CIO, CLC, herein the Petitioner, entered into a Stipulated Election Agreement, herein Agreement, which Agreement was approved by the Regional Office on March 2, provided that an election would be conducted on March 31, at two time periods from 7:00 a.m. to 9:30 a.m. and from 3:00 p.m. to 4:00 p.m. in the Multipurpose Room at the Employer's Main Administrative Building located on Thermal Road, Charlotte, North Carolina. The appropriate collective-bargaining unit, as set forth in the Agreement, is as follows:

45

All full time and regular part-time employees including Aftercare Counselor, Behavioral Health Counselor, Cook, Crisis Counselor, Foster Care Trainer/Recruiter, Intake Coordinator, Maintenance Technician, Medical Office Assistant, Nurse (LPN), Quality

¹ All dates herein are 2005 unless otherwise indicated.

Review Specialist, Special Education Teacher, Training Coordinator and Therapeutic Recreation Assistant employed by the employer in the Charlotte, North Carolina area facilities; excluding Case Coordinator, Case Manager, CHOICES Therapist, Education Coordinator, Foster Care Coordinator, HBFS Specialist, HBFS Lead Specialist, Intensive Case Manager, Intensive Therapeutic Foster Care Coordinator, LCSW Therapist, Lead LCSW Therapist, MST Therapist, Nurse (RN), Psychologists, Therapeutic Recreation Specialist, Special Education Teacher (licensed), Therapeutic Case Manager, Wraparound Coordinator, Lead Behavioral Health Counselors, Lead Crises Counselor, all office clerical employees, professional employees, guards and supervisors as defined in the Act.²

The Corrected Tally of Ballots, copies of which were prepared and made available to the parties, shows the following results for the March 31 election:

Approximate number of eligible voters.....	115
Number of Void ballots.....	0
Number of Votes cast for United Steelworkers of America, AFL-CIO, CLC.....	43
Number of Votes cast against participating labor organization(s).....	39
Number of Valid votes counted.....	82
Number of Challenged ballots.....	6
Number of Valid votes counted plus challenged ballots.....	88

The challenged ballots are determinative of the result of the election.

On April 7, the Employer filed timely Objections to the conduct of the election and conduct affecting the results of the election. On April 20, the Regional Director issued a Report on Objections and Challenges, Order Directing Hearing and Notice of Hearing wherein he noted the parties on April 15, stipulated that three of the six challenged ballots were resolved concluding the three were not eligible to vote and their ballots would remain uncounted. The Regional Director indicated that on April 19, he had issued a Revised Tally of Ballots showing the following results:

Approximate number of eligible voters.....	115
Number of Void ballots.....	0
Number of Votes cast for United Steelworkers of America, AFL-CIO, CLC.....	43
Number of Votes cast against participating labor organization(s).....	39
Number of Valid votes counted.....	82
Number of Undetermined Challenged ballots.....	3
Number of Valid votes counted plus challenged ballots.....	85
Number of Sustained challenges (voters ineligible).....	3

The remaining undetermined challenged ballots are not sufficient to affect the results of the election. A majority of the valid votes plus challenged ballots as shown in the Final Tally has been cast for United Steelworkers of America, AFL-CIO, CLC.

The Regional Director concluded the Employer's Objections raise substantial and material factual issues which may best be resolved by hearing. The Regional Director's Order Directing Hearing concluded by ordering that a Report be prepared and served upon the parties and the Board containing resolutions of the credibility of witnesses, findings of fact and recommendations to the Board as to the disposition of said issues.

² Throughout this Decision, the above shall be referred to as the Unit.

II. The Employer's Objections are as follows:

1. The Board Agent Conducted the Election in a Manner Contrary to the Understanding of the Parties and the Determination of the Board Agent at the Morning Pre-Election Conference Without Notice to Alexander.

Alexander requested that voters' identification be verified in finalizing the Stipulated Election Agreement and at the first pre-election conference. At the first pre-election conference, in response to Alexander's request, the Board Agent determined that voters' identification would be checked and undertook to do so. The Union representative did not object to this described procedure and Alexander understood that there was agreement to check identification as part of the Election procedures. To the extent that the Board Agent changed the identification procedure understood by the parties at the pre-election conference and otherwise employed the Self-Identification/Challenge Procedure—notwithstanding Alexander's objections to a different procedure and without notice to Alexander—the Board Agent's conduct created reasonable doubt as to the Election's fairness and validity.

2. The Morning Pre-election Conference Held by the Board Agent Did Not Sufficiently Orient Observers and Inform the Parties of Election Procedures Such That the Parties Could Provide Supplemental Instructions to Ensure Fairness and the Protection of the Parties' Interests.

During the morning pre-election conference, Alexander requested that voters be positively identified, and as detailed above, understood that the Board Agent had determined that checking identification would be part of the Election voting procedures. The Board Agent did not indicate to the parties at the morning pre-election conference or at any time prior to the Election that she would instead implement the Self-Identification/Challenge Procedure. Consequently, the parties did not have an opportunity to provide instructions to observers on how, given the procedures the Board Agent actually employed, they could best ensure a fair election and protect the interests of their respective parties.

3. The Self-Identification/Challenge Procedure Employed by the Board Agent to Verify the Identity of Voters is Contrary to the Board Policy.

The Self-Identification/Challenge Procedure of identifying voters is at odds with the policy of the Board set forth in the NLRB Case Handling Manual. That document provides in relevant part that the procedure at the poll checking table should be as follows:

The approaching voters...should be asked to call out their names, last names first as they reach the table. They may also be asked for other identifying information, as necessary.

...

The voter should give his or her identifying information, not an observer. Once a voter's name has been located on the eligibility list, all observers are satisfied as to the voter's identity and no one questions his/her voting status, each observer at the checking table should make a mark beside the name.

NLRB Case Handling Manual § 13222.1. Thus, the Board Agent, by substituting the Self-Identification/Challenge Procedure, disregarded the Board policy, which permits persons at the checking table to request identifying information in order to verify the identities of voters, and directs observers to make a mark next to a voter's name *after* "all observers are satisfied with the voter's identity." *Id.*

The Board Agent's departure from Board policy and established procedures alone is grounds to cast reasonable doubt on the fairness and validity of the Election. Her disregard in this circumstance particularly upsets the fairness and validity of the Election given that: (i) the substituted procedures were not adequate to validate the identity of the voters in this Unit as exemplified by the Johnson Mix-UP (*see* Objection 4); (ii) Alexander requested procedures consistent with those set forth in the Case Handling Manual; and (iii) the Board Agent deviates from approved procedures without explanation and without notice to the parties.

4. The Self-Identification/Challenge Procedure Employed by the Board Agent to Verify the Identity of Voters is Inadequate to Minimally Ensure the Identity of Voters and Provide an Opportunity to Challenge, if Necessary, Ineligible Voters.

As maintained by Alexander before and during the morning pre-election conference, the nature of the Bargaining Unit is such that election observers cannot readily verify the identity of voters. Indeed, the Johnson Mix-Up underscores this characteristic of the Bargaining Unit and emphasizes that the Self-Identification/Challenge Procedure was woefully inadequate to assure a fair election. Indeed, where the observers are unfamiliar with the voters, self-identification is inappropriate, particularly where, as here, the observers have no means—save a full-blown eligibility challenge—to identify voters. *See, e.g., Avondale Indus., Ind. v. NLRB*, 180 F.3d 633, 638 (5th Cir. 1999) (overturning election using self-identification where observers unfamiliar with voters).

5. The Board Agent's Self-Identification/Challenge Procedure for Verifying the Identity of Voters Undoes the Role of Election Observers Under Board Policy.

The NLRB has determined that: "The observers not only represent their principals but also assist in the conduct of the election and are given the responsibility, *inter alia*, to identify and check off voters on the eligibility list as they appear to vote." *Montford, Inc.*, 318 NLRB 209 (1995). By prohibiting the observers from asking for *any* identification and requiring that identity questions be resolved solely through eligibility challenges for cause, the Board Agent placed the parties' election observers in the untenable position of trying to validate voters, but having to issue scores of challenges to do so. Indeed, there is no doubt pressure on an observer to avoid severely slowing an election, particularly given that she would be perceived as doing so because she distrusted self-identifying voters. This regime used by the Board Agent makes it difficult for observers to be effective in their role of protecting their principals' interests. This is particularly true here where the Self-Identification/Challenge Procedure was foisted on the observers without an opportunity to discuss them with the parties.

6. Even if the Parties Did Not Agree to the Identification Procedures Reviewed at the Morning Pre-Election Conference, the Board Agent Was Obligated to Determine Whether to Require Identifying Information in Addition to Self-Identification of Voters and Communicate Such Determination to the Parties Prior to the Election.

As explained above, it is Alexander's position that, during the morning pre-election conference the parties had agreed and the Board Agent had determined that voters would be asked for identification as part of the Election procedures. Even if there were no agreement, however, the Board Agent was obligated to make a determination regarding whether voters identification should be required in the Election and was obligated to communicate such determination to the parties. Indeed, the NLRB Casehandling Manual § 11312.4 specifically

requires: "If agreement is not reached between/among the parties [regarding identifying information to be utilized by voters as they approach the checking table], the Regional Director should consider whether to require identifying information in addition to self-identification by voters." Thus, even if there were no agreement on identification procedures, because the Board Agent did not determine what identification procedures would be used and did not communicate her determination to the parties prior to the Election, she violated Board policy. Such conduct casts reasonable doubt on the fairness and validity of this Election.

7. The Afternoon Pre-Election Conference Held by the Board Agent Was Inadequate to Advise Observers and Parties of Election Procedures and Denied Alexander and Opportunity to Ensure its Observer Understood the Board Agent's Instructions.

The Board Agent arrived approximately four minutes prior to the afternoon voting session in order to conduct the afternoon pre-election conference. Because of the limited time prior to opening the polls, the Board Agent truncated the conference and dismissed the parties without explaining that she had instituted the Self-Identification/Challenge Procedure and before she instructed Alexander's observer. As a result, Alexander was denied and opportunity to ensure its observer understood instructions given to her and Alexander was still without notice of the self-Identification/Challenge Procedure utilized by the Board Agent.

8. The Board Agent's Failure to Explain Identification Procedures in the Presence of the Parties at the Pre-Election Conference Led to Confusion About the Identification Process and Election Procedures.

As detailed above, the parties understood that voters' identification would be checked as part of the Election procedures. Because the Board Agent implemented the Self-Identification/Challenge Procedure after polling had begun and without notice to Alexander-Alexander believed the Election was being conducted according to the procedures outlined in the morning pre-election conference, while its observer was informed-at the poll checking table-that the Self-Identification/Challenge Procedure would be used instead. Such disconnect between the procedures under which Alexander believed the Election was being conducted and those under which the Election was *actually* conducted persisted during both voting sessions because the Board Agent never informed Alexander's representatives of the change and did not conduct a genuine pre-election conference prior to the afternoon voting session. By conducting the entire Election in this manner, the Board Agent created confusion regarding the Election's procedures, denied Alexander and opportunity to resolve such confusion with the Board Agent and its observers, and created reasonable doubt concerning the fairness and validity of the election.

9. The Board Agent's Conduct of the Election Generally Created an Atmosphere of Confusion That Casts Doubt on the Election's Fairness and Validity.

Conduct by the Board Agent caused general widespread confusion concerning Election procedures and undermined the confidence in the Board's ability to conduct a fair and valid election. Among other things leading to such confusion were the following: the Board Agent instituted identification procedures contrary to established Board policy without notice to the parties; the Board Agent omitted a number of items Board policy requires to be discussed from the morning pre-election conference; the Board Agent did not conduct a genuine afternoon pre-election conference in accord with the instructions of the Acting Regional Director; the Board Agent gave no attention to the checking table while assisting voters with challenged ballots; the Board Agent twice closed the polls early; and

upon the conclusion of the tally of ballots, dually announced that (i) the number of challenged ballots were sufficient in number to affect the results of the election (i.e., no party had a majority of the total votes cast) and (ii) that the Union had obtained a majority of the valid votes and the challenged votes (the total votes cast). Such conduct, *in toto*, created an atmosphere of confusion concerning Election procedures and casts reasonable doubt on the fairness and validity of this Election.

10. The Board Agent Widely and Routinely Departed From Established Board Policy and Procedures Which Cumulatively Created Reasonable Doubt As to the Fairness and Validity of the Election.

The Board Agent widely and routinely departed from established Board policy and procedures in conducting the Election. Such departures include: departing from approved voter identification procedures outlined in NLRB Casehandling Manual § 13222.1; omitting items from the pre-election conference that Board policy requires to be discussed; if there were no agreement of the parties on the identification of voters, failing to determine and communicate Election identification procedures to the parties per NLRB Casehandling Manual § 11312.4; failing to conduct a genuine afternoon pre-election conference as required by Board policy and the instructions of the Acting Regional Director; and twice closing the polls early. Such departures, without explanation or notice to the parties, cumulatively undermine the confidence in the Board's conduct of this Election and cast reasonable doubt as to the fairness and validity of the Election.

11. At Least One Third Party or Union Agent Misinformed Voters of the Polling Times on the Day of the Election.

In at least two instances, a Bargaining Unit Employee (whose status as a Union affiliate or agent is uncertain, but who was seen embracing the Union representative and organizer during the afternoon Election voting session) told eligible voters that they could vote in the Election until 5:00 p.m. In both cases, the voters arrived at the polling place to vote prior to 5:00 p.m., consistent with the polling times they had been given. After learning that the polls had closed earlier, each expressed disappointment because she had intended to and would have voted in the Election. Because these voters—and perhaps others—were disenfranchised by the acts of this Bargaining Unit Employee through no fault of their own in this close Election, the Election should be set aside and a new Election ordered.

III. The Facts

The Employer is a non-profit company that provides residential and day treatment services to children with or at risk of serious emotional disturbance. The Employer serves approximately 1,275 children (infants to age 17) per year. The Employer has approximately 370 employees, with 148 parent volunteers. Two Hundred Seventy-eight of the employees work in the Charlotte, North Carolina, area where the bargaining unit is located. The Employer has its 50 acre main campus location in Charlotte where it has its administrative, clinical and business offices. It also has three adjoining residential treatment buildings and two psychiatric treatment facilities on its main campus. There are two Group Homes located on the main campus and two additional ones located elsewhere in Charlotte. The Employer also has at separate locations a Fifth Street based community services facility a Transition House and a Crisis Shelter facility. Approximately eighty-five of the eligible 115 bargaining unit employees work on the main campus. The remainder of the bargaining unit employees work at the other facilities located throughout the Charlotte area.

The Employer is open and staffed 24 hours per day 7 days per week 365 days per year. Some employees work the “daytime” first shift, others the “second shift”, from approximately 2:00 p.m. until midnight, and, a “third shift” starting around midnight until approximately 8:00 a.m. There are also variations of these shifts. Employer President Craig Bass thought most bargaining unit employees would know a “fair number” of those working at locations other than their own but said he would “think” no one would know them all.

Pursuant to the Stipulated Election Agreement approved on March 2, the parties agreed to a Board conducted election to be held on March 31. The Acting Regional Director in a March 4, letter to the parties advised, among other things, that Notices of Election would be forwarded to the Employer for posting and reminded the Employer that the Board’s Rules and Regulations required employers “to post the Board’s official Notices of Election in conspicuous places at least three (3) full days prior to ...the day of the election.” Employer President Bass testified such notices were timely posted “at each of its facilities.” Employer President Bass testified he believed employees could come to work without necessarily going to where the notices were posted; however, he testified “our bulletin board policy and the personnel policies tells folks they are expected to look at the bulletin board at their designated boards where...information is posted.” Employer President Bass testified communication with employees was very important to this company and it utilizes e-mails, memorandums, meetings, bulletin boards and face-to-face type communications to keep employees informed. Employer President Bass sent, for example, a memorandum to all Charlotte employees on March 3, entitled “Steelworkers Union Organizing Effort.” One of the twelve paragraphs in the memorandum reads as follows:

Alexander, the Steelworkers, and the NLRB agreed at the hearing that a union election will take place on March 31, 2005 in the multipurpose room at our Thermal Road campus. The election will be conducted by the NLRB from 7:00 a.m. until 9:30 a.m. and from 3:00 p.m. until 4:00 p.m. to give eligible voters a chance to vote

Intake Coordinator Carrie Spencer testified the Employer has a weekly newsletter “The Fast Track” by which employment and other types of information is provided to all employees.

Intake Coordinator Spencer testified that after the announcement of the upcoming vote on the question concerning representation was made both the Employer and Petitioner began to campaign for votes. Spencer testified; “Management met with us to give us factual information. We got information in the mail from the Union side and also from Alexander’s side.” Training Coordinator April Simmons Liner testified about the campaigning; “We got things in the mail. There were things posted on bulletin boards in the clinical hallway. We had meetings. Those type of things.”

A pre-election conference was held in the multipurpose room at the Employer’s facility at approximately 6:30 a.m. on March 31. Those present for the Employer were Attorney Jonathon C. Krisko, election observers Spencer and David Winfield and representatives Paul Sommerville and Bob Morton. Present for the Petition were International Representative Samuel Penn and observer Nanonia Christian. Region 11 Board Agent Ingrid Jenkins conducted the pre-election conference.

Employer observer Spencer testified she had been asked to serve as an observer for the

Employer about a week before the election. Spencer stated the Employer wanted to have two observers with Winfield being the second one; however, he was challenged as being a supervisor and not utilized. The Employer did not thereafter pursue having a second observer. The Petitioner had one observer. Board Agent Jenkins gave Employer observer Spencer and Petitioner observer Christian NLRB Form 722 "Instructions to Election Observers" which outlines observer's "Principle Functions" and "Duties." The four principal functions listed on Form 722 are "Monitor Election Process", "Help Identify Voters", "Challenge Voters and Ballots" and "Assist Board Agent in the Conduct of the Election". NLRB Form 722 lists, in part, under the Section "Duties" that out observers are to identify voters and challenge voters; and specifically notes that an observer has the right to challenge a voter for cause. The instructions state that any challenge must be made before the voter's ballot has been placed in the ballot box.

Employer observer Spencer testified:

She [Board Agent Jenkins] asked us to read it [NLRB Form 722] and see if we had any questions, and told us basically what our duty was to identify voters and to place a checkmark by their name as we identified them. She would ask them to state their name as we identified them. She would ask them to state their full name. We are not to have any conversations with any of the voters, we could greet them, say good morning, but all questions needed to be directed to her.

Spencer testified Board Agent Jenkins did not tell them they would not be allowed to check voter's identification. Petitioner observer Christian testified Board Agent Jenkins asked she and Employer observer Spencer to read the observer instructions and if there was anything they did not understand to "point it out" and she would "explain it." Christian testified Board Agent Jenkins told them they "could both challenge votes and...she could also..." Christian testified Spencer did not raise any concerns.

Company Attorney Krisko testified he, on behalf of the Employer, raised the issue of increasing the number of observers from one to two but their second proposed observer was quickly challenged as being a supervisor and left the pre-election conference. Krisko said the Employer had wanted two observers for voter identification purposes. Krisko testified he raised voter identification at the pre-election conference testifying:

I mentioned, in discussing and understanding the nature of the employees in this bargaining unit it was very clear that because they did not work with one another the observers could not recognize and validate the identities of the voters. To prevent voter fraud we thought it was necessary to implement procedures that could positively identify the voters.

Employer Attorney Krisko stated Board Agent Jenkins said she would identify voters.

Petitioner International Representative Penn testified that at the morning pre-election conference after the Board Agent advised that the Stipulated Election Agreement provided for one observer only per side that the Employer's representatives stated they had so many employees and would not know who they were. Penn testified he stated that if the Employer wanted to have a second observer just to identify employees that was fine. Penn stated he did however object to the Employer using a supervisor as its second observer. Penn testified the Employer's representatives

determined they did not want to use the second observer they had present at the pre-election conference for fear he would be deemed a supervisor. Penn testified there was no other mention, in his presence, of voter identification at the pre-election conference.

5 Each of the observers wore a button identifying them as observers. There was a “long table” in the voting area with the observers setting at one end and the Board Agent at the other end. All windows to the voting area were covered and a ballot box was provided for the voters to place their ballots. A voting booth with curtains for privacy was utilized. The door to the voting area remained closed except when voters entered and left. According to Employer observer Spencer
10 voting started at the scheduled time of 7:00 a.m. Spencer testified:

[Board Agent] Jenkins would ask them their name, and we [Spencer and Christian] were to identify the voter and put a checkmark by their name. Then, they proceeded to go in to the little voting box and place their vote and then came out, fold it in half, put it in the ballot
15 box, and they were to exit immediately.

Petitioner observer Christian testified the voting was at “a nice steady pace” and they never felt rushed or unable to keep track of the voters. According to Christian no voters were challenged in the morning session. Employer observer Spencer testified that after about four or five employees
20 had voted a voter came in and Board Agent Jenkins asked for the voter’s name. The voter gave her full name, which was on the list but, Spencer stated she did not know the person. Spencer testified she later learned the voter was Priscilla Sonpun. According to Spencer, Sonpun heard her say she needed identification and responded that she had just worked third shift and didn’t have her identification on her. Spencer testified:

[Board Agent] Jenkins said that it was not in the Labor Board’s policy to have to check identification. She asked Nanonia [Christian] did she know her, and Nanonia did, and said as long as Nanonia [Christian] knew her and she was able to state the full name that was on the piece of paper, then she would be eligible to vote, and that if I wanted to see
25 identification, then we would have to challenge the vote for cause.

Petitioner observer Christian acknowledged she knew the voter, whose name was on the list, and the Board Agent allowed the individual to vote. Christian stated “[t]he Agent said that as long as one of you recognizes her that she’s allowed to vote if her name is on the list.” Christian testified there
30 were no other disputes or issues over voters in the morning session.

Employer observer Spencer testified the Board Agent told her the Employer wanted to check identification but that the Petitioner did not agree; therefore, the policy was that they did not need to check identification, that voters just needed to state their full name. Spencer said she was
40 “shocked” thinking she would not know everyone. Spencer said that at this point she could not discuss it with the Employer’s representatives and she was “confused” and “unsure” as to when she could challenge a voter that she did not recognize. Spencer testified the written observer instructions reflected she was not to argue with the Board Agent and she viewed the Board Agent as “the authority figure.” Spencer said she did not challenge any voters that she did not recognize and
45 she did not recognize approximately eight voters. Petitioner observer Christian testified there were no voters that neither she nor Employer observer Spencer did not know. Spencer stated no voters were turned away that came to vote.

Employer observer Spencer testified that Board Agent Jenkins placed a “temporary seal” on the ballot Box at about 9:20 a.m. and placed the box in front of the two observers. Spencer testified; “shortly thereafter, another voter came in; she [Jenkins] took the temporary seal off the box and returned it to the chair where it was sitting and let the voter proceed to vote.” Petitioner observer Christian did not recall any temporary seal being placed on the ballot box but stated no one was turned away from voting once they arrived.

Employer observer Spencer testified the polls closed as scheduled at 9:30 a.m. Spencer testified she observed the Board Agent place a “permanent seal” on the ballot box. Spencer placed her signature across the tape sealing the ballot box. Spencer testified she did not, after the morning session, complain to anyone that Board Agent Jenkins had not allowed for identification of voters because she “figured she [Jenkins] was the authority figure and knew the policies of the vote.” Petitioner observer Christian testified the observers had an opportunity to talk with their representatives about any issues that might have come up during the morning voting. Christian said she did not raise any concerns with her representative. Employer observer Spencer testified that after the polls were closed there was a brief meeting at which the Board Agent said they would not need another pre-election conference before the after noon voting session. The Employer advised they would have a new observer and it was agreed there would be a pre-election conference at 2:45 p.m. with the polls opening at 3:00 p.m.

The afternoon observer for the Employer was April Simmons Liner. She testified the parties arrived for the pre-election conference at approximately 2:30 p.m. Liner stated the Employer was represented by Sommerville and Morton along with attorney Krisko and herself. Employer observer Liner stated the Petitioner was represented by International Representative Penn and observer Christian. Petitioner observer Christian testified the parties did not arrive for the pre-election conference until 2:45 p.m. Board Agent Jenkins arrived at approximately 2:50 p.m. Employer observer Liner testified Board Agent Jenkins asked everyone to introduce themselves and;

“I think she may have asked [Krisko], as the [Employer] attorney, if you were okay with some things, I think you said yes. You guys [the parties representatives] were kind of hurried out because we were running late. She [Board Agent] handed us the, I guess the roles of the observer. She briefly went over how we were suppose to identify voters by asking them their full names, that we weren’t suppose to have any conversations with them, that we could greet them, but that was the extent of the conversation that we could have with them. And she put up the voting booth and we opened the polls.”

Employer observer Liner stated Board Agent Jenkins did not talk with her about voter identification. Liner testified that either she or Petitioner observer Christian asked each voter to state their full name and if their name was on the list they were allowed to vote.

Liner testified Board Agent Jenkins did give her a copy of “Instructions to Election Observers” to read prior to the voting taking place. Petitioner observer Christian testified that after Liner read the instructions that Board Agent Jenkins asked if she had any questions and told Liner she had a right to challenge a vote if she chose to do so.

According to Employer observer Liner the polls opened slightly after 3:00 p.m. but she could not say if it was one, three or five minutes after 3:00 p.m. Liner did state that all those ready to vote at 3:00 p.m. were allowed to, and did, vote. Petitioner observer Christian testified the polls opened at 3:00 p.m.

Neither Liner or Christian challenged any voters in the afternoon session. Employer observer Liner testified she recognized "most" everyone that came to vote but "there were a couple of people that I didn't recognize by face. I knew their names, but I didn't know them by their presentation." There were challenges in the afternoon session by Board Agent Jenkins for failure, of the voter, to be on the voting list.

Employer observer Liner testified Board Agent Jenkins closed the polls "a little bit before 4:00 a.m." stating "I'm not sure exactly what time, but it was before 4 o'clock." Liner stated, however, that a voter came in during that time to vote and was allowed to do so. Both Liner and Christian stated all who showed up to vote were allowed to do so with no one being turned away. Petitioner observer Christian testified either she or Employer observer Liner or both knew each of the voters in the afternoon session. Petitioner observer Christian testified the last voter, Lakeeta Flipping came "running in" saying "I'm sorry, but I'm here" "can I vote" and the Board Agent looked at the clock and said "It is 4:00 o'clock," and allowed her to vote.

Both observers testified that two employees with the same name showed up to vote. Employer observer Liner testified that a voter identified herself as Marquis Johnson. Liner said she remembered that name, "because we have two employees by that name, and when she presented herself her name had already been checked off the list as having voted already." Employer observer Liner testified Petitioner observer Christian asked Johnson for her address and when it did not match the address on the voter list the Board Agent was informed and Johnson voted a challenged ballot.

Petitioner observer Christian testified she did not feel rushed or in any way unable to keep track of voters in the afternoon session. Christian testified that at 4:00 p.m. Board Agent Jenkins placed a temporary seal on the ballot box and invited the parties in. Christian stated Board Agent Jenkins explained the procedure for counting the ballots and allowed each observer an opportunity to speak with their representatives. After the observers had an opportunity to visit with their representatives Jenkins invited anyone in that wished to observe the counting of the ballots. The ballots were counted with the results noted earlier herein.

Behavioral Health Counselor Samantha King testified she arrived at the polling place on the day of the election at 4:30 p.m. to vote. King saw a former supervisor who told her the election was over and the ballots were being counted. King said she was very disappointed she did not get to vote. King was not scheduled to work on the day of the election and stated, "I had other things I wanted to do that day. So, I wanted to be able to plan my schedule so I could do things I wanted to get accomplished, plus go vote." King said she called the Barnhart Group Home where she worked and spoke with employee Ralph Froneberger. She asked Froneberger how long the polls would be opened and he told her until 5:00 p.m. King said she did not regularly contact co-worker Froneberger for information.

Carshia Pollard testified she works for the Employer on the weekends as a Behavioral Health Counselor and as a 9th grade English teacher during the week for the Charlotte Mecklenburg School System. Pollard said she was not scheduled to work the day of the election and was unsure of the exact time the polls would be open. Pollard telephoned employee King to find out the voting hours. King did not know but said she would call her group home find out the time and telephone Pollard. King thereafter telephoned Pollard that the polls would close at 5:00 p.m. King told Pollard she had gotten her information from Froneberger. Pollard arrived at the Employer at 4:40 p.m. where she “learned that the election was over and that they were counting up the votes.” Pollard was disappointed she did not get to vote. Pollard acknowledged she received notices and memorandums from the Employer whenever the Employer wanted she, and the other employees, to be made aware of events at the Employer.

Employer Vice President of Program Operations Gerald Mack testified he observed Froneberger with employee Nicole Robinson talking with other employees in the smoke brake area in the parking lot of the main campus one or two days before the election. Mack testified Robinson was wearing a “Vote Yes for the Union” button at the time. Employer Vice President Mack asked Froneberger and Robinson what their business was on the campus, what their schedules were and what they were doing. According to Mack, Robinson said she was on campus working and was on break. Employer Vice President Mack say he directed Robinson to go back to work if her break was over. Mack testified Froneberger said he was not on shift that he worked at the Barnhart Group House. Employer Vice President Mack said he asked Froneberger to leave the main campus at that time.

Employer Vice President Mack testified he observed Froneberger speaking with International Petitioner Representative Penn, Petitioner observer Christian and employee Jonathon Hardin after the election ballots had been counted.

Petitioner International Representative Penn testified that after the votes were counted he and Christian left the area when an employee, Jonathon Hardin, walked up and asked what had happened with the challenged voters. Penn testified he was giving Hardin “a short synopsis of the process” when another individual approached and was there for approximately 45 seconds. Penn stated that, based on testimony he heard at the hearing herein, he assumed the individual was Froneberger, but added, “I could not pick him out if I had to.” Penn testified Froneberger could not have obtained voting times from him because he had no contact with Froneberger. Petitioner observer Christian testified Froneberger asked Penn “How did it turn out” and Penn gave him the count.

IV. Discussion Analysis and Conclusions

I shall address each objection raised by the Employer. However, the Employer, in its numbered objections, reiterates certain contentions throughout most, if not all, of the objections. I shall review the Employer’s objections under three main categories. First, was the voter identification procedures utilized herein, namely self-identification, sufficient to protect the integrity of the election. Included in this overall objection category is the issues of what, if any, procedures the parties agreed to and what, if any, instructions were given by the Board Agent to the parties’ observers. Additionally, did the Board Agent depart from established Board policies and

procedures in conducting the election? Second, did the Board Agent twice close the polls early? Third, did a third party and/or Petitioner agent misinform voters of polling times on the day of the election?

5 **A. Casehandling Manual and Certain Principles**

In addressing the issue of voter identification procedures, as well as related matters, it is helpful at this point to note portions of the Board's Casehandling Manual Part Two Representation Proceedings (Manual) as well as certain established principles.

10 Sections 11300-11350 of the Manual outlines objectives and sets forth guidance regarding conducting elections. First the prompt resolution of questions concerning representation is a primary objective of the Act. The Manual provides, in part, as follows:

15 Elections may be conducted pursuant to...a Stipulated Election Agreement...

* * * *

The arrangements and voting procedure in all elections are the same, whether they be by agreement or by direction.

* * * *

20 The date, place, and hours are ordinarily based upon the parties' voluntary meeting of the minds (with the Regional Director's approval), as reflected in an election agreement.

* * * *

25 Each party may be represented at the polling place by an equal, pre-designated number of observers... If the election is being conducted pursuant to an election agreement, a breach of the agreement's provision for an equal member of observers is a material breach which warrants setting aside the election upon the filing of appropriate objections.

* * * *

30 Parties should be requested to designate their observers in advance of the election....observers should be employees of the employer.... A supervisor should not serve as an observer.

* * * *

The observers represent their principals, carrying out the important functions of challenging voters and generally monitoring the election process. They also assist the Board Agent in the conduct of the election...

35 Observers should normally be given instructions at a conference immediately proceeding the election.

* * * *

40 On approval of an election agreement... the employer should be requested to prepare a list of the full names and addresses of eligible voters as of the last payroll period ending before the approval of the agreement...

* * * *

45 In sufficiently large or complex elections, the Board Agent should explore with the parties in advance of the election the identifying information to be utilized by voters as they approach the checking table. If agreement is not reached between/among the parties, the Regional Director should consider whether to require identifying information in addition to self-identification by voters.

* * * *

At the election, the eligibility list serves as a prima facie roster of voters.

* * * *

The Board Agent should give a copy of the Instructions to Observers Form NLRB-722 to each observer at the pre-election conference.... The observers should be given the opportunity to read it and ask additional questions. The following specific area should be covered briefly: (c) procedure for checking voters' names...and for challenged voters....

* * * *

The polls should be opened at the time scheduled. The Board Agent will select the official timepiece and so inform the observers.

A representation election is presumed to be fair and regular, unless proven otherwise. The burden of proof rests with the party objecting to the fairness of the election procedure. In overseeing a representation election the Board seeks to have an ideal atmosphere in which employees are free to make their choice without interference by the parties or those conducting the election. Board election procedures are designed to ensure both parties an opportunity to monitor the conduct of the election. Objections in close elections must be carefully scrutinized. See e.g. *Robert Orr-Sysco Food Services 338 NLRB 614, 615 (2002)*. "The Board has been entrusted by Congress with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. To this end, the Board allows each party to be represented at the polling place by an equal number of observers. The observers not only represent their principals but also assist in the conduct of the election and are given the responsibility, inter alia, to identify and check off voters on the eligibility list as they appear to vote [footnotes omitted]" *Monfort, Inc. 318 NLRB 209 (1995)*.

The Board attempts to ensure that the manner and method in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election. In conducting representation elections the Board must maintain and will protect the integrity and neutrality of its procedures. *Fessler & Bowman, Inc., 341 NLRB No. 122 sl. Op. p2 (May 12, 2004)*. "The Board, throughout its entire history, consistently has gone to great lengths to assure that its role in the conduct of elections is not subject to question." *Paprika Fono 273 NLRB 1326, 1328 (1984)*. If a Board Agent conducting an election commits an act which tends to destroy confidence in the election process or could be interpreted as doing so the Board will set such election aside and direct a new one. *Jakel, Inc., 293 NLRB 615, 616 (1989)*.

Both the Employer and Petitioner cite the decision of the Fifth Circuit Court of Appeals in *Avondale Industries, Inc., v. N.L.R.B., 180 F.3d 633 (5th Cir. 1999)*, in support of their respective positions on the Employer's objections. The *Avondale* case came before the Court on the petition of the Board seeking enforcement of its bargaining order. The Court noted that an order requiring an employer to negotiate with a union will be enforced if the Board's decision to certify the union is reasonable and based on substantial record evidence. The certification order's enforceability depends, at least in part, on the validity of the underlying election. Pertinent to the objections herein, the Court decided *Avondale* on the issue of voter identification. One of the Company's complaints in the *Avondale* case was that the Board refused to enforce any system of voter identification beyond self-identification. The Court noted that while the Board "aspires" to an "ideal atmosphere" in which voters' choices are made by employees without interference from the parties or the Board such "laboratory conditions" represent the "ideal" but that "clinical asepsis" is an unattainable goal in the real world of union organizational efforts. The Court noted it must compare the conduct of a challenged election to the "laboratory conditions paradigm" while keeping

in mind the realities of industrial life. The Court stated in examining voter identification procedures it was not attempting to determine if “optimum practices” were followed but rather whether on the facts the manner in which the election was held raised a reasonable doubt as to its validity. The Court concluded on the facts in *Avondale* that the voter identification procedure of self identification was “utterly insufficient.” In concluding that the voter identification procedures were “fatally” flawed. The Court noted:

Under the Circumstances presented here – a very large work force, the NLRB’s foreknowledge that a substantial number of the votes would be challenged, observers unable to be personally acquainted with the voters, multiple voting zones, and 11-½ hours election without rigid controls over access to the polls, serious allegations of improper campaign tactics, and a close result– –we conclude that the voting identification procedures were fatally flawed.

The Court observed: “verbal self-identification is appropriate when – as is probably true in a large portion of cases – it is likely that the observers are personally acquainted with the voters.” The Court went on to state: “It is wholly inadequate, however, as the sole guide to identification, where a very large bargaining unit is contemplated, and the voter lists contain virtually the only information that will assure the identity of the voters.” The Court cited two examples of the Board going beyond its “standard practice” of voter self-identification. The first involved a unit of 19,000 with 65 polling places namely, *Newport News Shipbuilding 239 NLRB 82 (1978)*. The second involved a unit of 1,500 namely, *Monfort, Inc., 318 NLRB 209, 209-210 (1995)*. The Court stated: “The procedures used in *Newport News* [in addition to self-identification the voter provided the last four digits of his/her social security number] and *Monfort, Inc.*, [employee identification cards were used to assist in identification] confirm this common sense notion of [additional identification] and equally condemn the unthinking adoption of ‘standard practice’ for a multi-thousand employer like *Avondale*.” The Court further observed: “[v]oter identification procedures appropriate for representation elections in small units may be inadequate when the eligible voting pool becomes very large.” The Court noted the union in *Avondale* “achieved 54% of the votes, but a margin of only 130 votes out of nearly 4000 cast and counted [there were 850 challenged ballots] controlled the result.” The Court noted the *Avondale* election was “bitter” “hostile” “high profile” and “hotly-contested” such as sure to “provoke suspicion in whichever party lost.” The Court therefore concluded extreme care should have been taken with respect to voter identification.

The Court concluded in *Avondale*, “The NLRB’s failure to implement more extensive identification procedures for this large-scale representation election, combined with evidence of potential voter fraud, raises serious questions regarding the validity of the representation election at *Avondale*.” The Court, ordered the election be set aside.

B. Voter Identification Procedures and Related Matters

I find the Employer has failed to meet its burden of establishing that the voter identification procedures utilized herein were improper or insufficient. The Employer has also failed to demonstrate or establish a reasonable doubt as to the fairness or validity of the election herein.

A review of the morning and afternoon pre-election conferences, the election, as well as post election proceedings, demonstrate the voter identification procedures utilized herein were

appropriate.

At the morning pre-election conference the Employer brought two observers to the conference seeking to increase its observers from the agreed upon one to two. The Employer's attorney requested the second observer for voter identification purposes. The Petitioner's representative did not object to the Employer having a second observer for identification purposes but specifically objected to the Employer using a supervisor as its second observer. The Employer's representatives determined not to utilize this second observer for fear he would be deemed a supervisor. The Employer did not thereafter pursue having a second observer for voter identification purposes. If the Employer had wanted to provide a non-supervisory second observer for voter identification purposes the Petitioner would not have objected. The Employer made no such effort to have a non-supervisory second observer.

At the morning pre-election conference the Employer's attorney raised a concern that it was necessary to implement procedures for positive identification of voters. The Board Agent indicated she would identify voters. The Employer did not thereafter pursue voter identification procedures. The Petitioner's representative testified no mention was made in his presence at the morning conference of voter identification other than the discussion of the Employer having two election observers. From the above it is clear there was no express agreement between the Employer and Petitioner regarding voter identification beyond self-identification. The Employer could have, but made no effort to, clarify what, if any, additional procedures would be utilized, or to obtain an express agreement from the Petitioner regarding voter identification. I am persuaded the Employer could not, as it contends, reasonably have understood from the Board agent's response that additional voter identification procedures would be utilized in the election.

The Board Agent instructed both observers at the morning pre-election conference to read the "Instructions to Election Observers" and told the observers they "could both challenge voters." The Board Agent asked if there was anything in the instructions the observers did not understand and if so to point it out and she would explain it. The Board Agent told the observers she would for identification purposes ask the voters to state their full name. The observers were told they could "greet" the voters say "good morning" to them but they were "not to have any conversations with any of the voters". I find nothing amiss in the Board Agent's instructions to the observers at the morning session.

The morning voting started at 7:00 a.m. and proceeded at a "nice steady pace.". Each observer wore a button or badge identifying them as observers. The Board Agent sat at one end of a long table with the observers at the other end. Windows to the voting area were blocked out, a voting booth with privacy curtains was utilized and a ballot box provided. Employer observer Spencer testified the Board Agent "would ask [the voters] for their names" and she and the Petitioner observer "were to identify the voter and put a check mark by their name." The voters cast their ballots in the voting booth and placed them in the ballot box and then exited. Petitioner observer Christian testified no voters were challenged in the morning session and that all voters were known by either she or Employer observer Spencer.

The fifth or sixth employee to vote in the morning session identified herself and was located on the eligibility list. Employer observer Spencer stated she did not know the voter but later learned

it was employee Priscilla Sonpun. Employee Sonpun heard Spencer say she needed identification and responded she had just finished her work on the third shift and did not have identification with her. Spencer testified the Board Agent told her it was not the Board's policy to check identification and asked Petitioner observer Christian if she knew Sonpun. Christian knew employee Sonpun.

5 According to Spencer the Board Agent stated that since Sonpun's full name was on the list and Christian could identify her she would be eligible to vote but, if Spencer wanted to see identification she would have to challenge Sonpun's vote for cause. Spencer said she was shocked when the Board Agent told her there was not an agreement by the parties to check identification thus the voters needed only to identify themselves and be on the eligibility list to vote. Spencer said she was

10 shocked because she thought she might not know everyone. Petitioner observer Christian testified the Board Agent said that as long as one of the observers recognized Sonpun and her name was on the list she should be allowed to vote. Sonpun voted without challenge. No other disputes or issues arose regarding identification in the morning voting session. Spencer testified she did not challenge any of the approximately 8 voters, including Sonpun, she did not recognize because she was

15 confused and unsure as to when she could challenge a voter that she did not recognize.

The observers had an opportunity, following the morning voting session, to speak with their respective representatives regarding any issues that might have come up during the morning voting. Petitioner observer Christian raised no issues. Employer observer Spencer said she did not

20 complain to anyone about the Board Agent not allowing for identification of voters because she figured the Board Agent was the authority figure and knew the policies of voting.

The Board Agent followed standard self-identification procedures in the morning voting session. There was no express agreement between the parties for any enhanced voter identification

25 procedures. Each voter who appeared at the polls was identified and allowed to vote. The specifically named voter the Employer's observer did not know was on the eligibility list and known by the Petitioner observer. The Employer's observer was specifically told she could still challenge the vote of the specifically named voter but declined to do so. I find very unpersuasive the Employer observer's testimony that she was too unsure, shocked and confused to know when

30 she could challenge a voter she did not recognize. The observers were given verbal, as well as, written observer instructions which covered, among other things, challenges. Each observer stated they understood the written instructions and was provided an opportunity to ask questions regarding the instructions. The fact the Employer may have chosen, as one of its observers, an individual that was not fully comfortable with or even confused regarding her observer duties does not invalidate

35 the procedures. The Employer's observer did not express her shock, confusion and unsureness to the Employer's representatives following the morning voting session even though she was provided an opportunity to do so.

The Employer has failed to demonstrate that improper voter identification procedures were

40 utilized or that the conduct surrounding the morning session raised reasonable doubt regarding the fairness and/or validity of the election.

I shall hereinafter address whether this was a sufficiently large or complex bargaining unit warranting special and/or specific identification requirements.

45

The Board Agent did not perceive a pre-election conference was necessary before the

afternoon voting session but, after the Employer stated it would use a different observer, she scheduled a pre-election conference for 2:45 p.m. The Board Agent arrived at 2:50 p.m. saying traffic caused her to be late. The Board Agent provided the observers with copies of the Board's NLRB Form 722 "Instructions to Election Observers." The Board Agent asked the new Employer observer Liner if she had any questions about the written instructions and specifically told her she had the right to challenge voters. Employer observer Liner stated the Board Agent briefly went over the observers duties and how they were to conduct themselves. Liner stated the Board Agent did not talk specifically with her about voter identification. The two observers at the afternoon voting session asked each voter for their full name and then if their name was on the eligibility list they were allowed to vote. Neither the Employer nor the Petitioner challenged any voters in the afternoon session. All employees who showed up to vote in the afternoon session were allowed to vote. Either one or both of the observers knew every afternoon voter. Employer observer Liner testified she recognized most everyone however there were a couple of people she did not recognize by face but knew their names. The Board Agent challenged voters in the afternoon session because their names were not on the eligibility list.

Two employees with identical names came to vote in the afternoon session. When the second Marquis Johnson appeared to vote her name had already been checked off the list as having voted. Petitioner observer Christian asked Johnson for her address and when it did not match the address on the voting list the Board agent was informed and the second Marquis Johnson voted a challenged ballot.

It is again clear the Board Agent, though late for the afternoon pre-election conference, properly instructed the observers regarding their specific duties. The Board Agent provided the observers copies of the "Instructions to Election Observers" and asked for questions. Voters were identified then allowed to vote. Six voters were challenged by the Board Agent for not being on the list with one of those being the one who had the same name as a fellow employee who had already voted. It is clear that in the afternoon session the voter identification procedure worked properly. Challenges were made where appropriate by the Board Agent and no challenges were made by the observers regarding identification of voters or for any other reason. The two voters the Employer's observer did not recognize nonetheless knew their names as employees. Furthermore, she did not ask that those two voters be challenged for lack of identification. The Board Agent followed standard self-identification procedures in the afternoon voting session and the Employer failed to demonstrate that the conduct surrounding the afternoon session raised reasonable doubt as to the fairness or validity of the election.

C. Poll Closings

I turn now to the Employer's contention the Board Agent closed the polls early.

Employer observer Spencer stated the Board Agent at the morning session placed a "temporary seal" on the ballot box at 9:20 a.m. and then placed the box in front of the two observers. Spencer testified that a voter thereafter came in to vote. The Board Agent removed the "temporary seal" returned the ballot box to its original position and the employee voted. Spencer said a "permanent seal" was placed on the ballot box after the polls closed at the scheduled 9:30 a.m. time. Petitioner observer Christian did not recall the use of any "temporary seal."

Employer observer Liner testified that at the afternoon session the Board Agent closed the polls a little bit before 4:00 p.m. Liner however, stated a voter came in during that time and was allowed to vote. A voter came in at 4:00 p.m. stating, "I'm sorry, but I'm here", "can I vote?" The Board Agent noted it was 4:00 p.m. The employee was allowed to vote. All who came to vote were allowed to vote.

Accepting as accurate that the Board Agent in fact placed a temporary seal on the ballot box prior to closing, but, at a time when no voters were present, does not establish an early closing of the polls. It simply demonstrates the Board Agent was attempting to protect the ballots. The contention the polls closed early at the afternoon session has not been established. All employees who came to vote were allowed to do so up to and including a voter arriving at 4:00 p.m. This objection of the Employer is clearly without merit.

D. Misinformed Employees Regarding Voting Time

Charlotte Mecklenburg School System English teacher and weekend Behavioral Health Counselor Carshia Pollard did not work on the day of the election herein. She contacted co-worker Behavioral Health Counselor Samantha King to find out what times the polls would be open for voting. King, who also did not work that day, did not know but said she would find out and notify Pollard. King called the Barnhart Group Home and spoke with the person answering the telephone whom she identified as Ralph Froneberger. King testified Froneberger told her the polls would be open until 5:00 p.m. King informed Pollard of the closing time. King appeared to vote at 4:30 p.m. and Pollard at 4:40 p.m. Both were told the polls had closed and the ballots were being counted. Both were disappointed.

Employer Vice President of Program Operation Mack observed Froneberger and employee Nicole Robinson in the smoke break area on the main campus talking with employees. Robinson was wearing a "vote yes for the Union" button at the time. Mack inquired if Robinson was on her work schedule. She was on break. Mack ordered her back to work when her break was over. Mack determined Froneberger was not on shift and ordered him to leave the main campus. Mack observed Froneberger speaking with International Petitioner Representative Penn, observer Christian and employee Hardin³ after the ballots had been counted.

Penn denied knowing Froneberger but acknowledged employee Hardin asked him after the ballots were counted what happened to the challenged ballots. A person approached Penn while he was explaining the challenged ballots to Hardin and asked how the election turned out.

The Petitioner was not responsible for disenfranchising the two potential voters. There is insufficient showing that Froneberger was somehow an agent of the Petitioner. Answering a random telephone call at the Employer does not make one an agent of the Petitioner. Merely standing near and/or speaking with someone wearing a pro-union button does not make one an agent for the Petitioner. Likewise asking Petitioner International Representative Penn how the representation election came out does not make one an agent of the Petitioner. Petitioner International Representative Penn did not even know that the individual asking the results of the

³ The individual's name is reflected in the record as "Hardin" and "Harding."

election was Froneberger nor did he know Froneberger. The two employees seeking voting schedules were not unsophisticated employees. They are not without fault. They had been provided memorandums and other materials with the voting times specifically reflected thereon. The Official Board Notices setting forth election times had been posted at the Employer's facilities.

5 King and Pollard had advance specific written notification of the voting times and with just mere diligence they could have presented themselves at the polls timely and have avoided the disappointment of not appearing timely to vote.

I recommend this objection be overruled.

10 **E. Large or Complex Bargaining Unit Issue**

Finally I address the Employer's contention that the bargaining unit herein was large and complex warranting additional voter identification safeguards. The standard procedure in representation elections is to have voters engage in self-identification by calling out their names, last name first, as they identify themselves. Voters may, as appropriately necessary, be asked other identifying information. In sufficiently large or complex elections, other identifying information may be necessary in order to prevent fraud and ensure a valid election, but such further identification information procedures should be explored with and agreed upon by the parties in advance of the election. It appears there was no advance expressly agreed upon voter identification procedures herein.

Verbal self-identification was appropriate herein. All employees voting were known to be whom they identified themselves to be. Some may have been known by only one observer, however, no voter was challenged by any observer based on uncertainty as to voter identification even though the observers were specifically advised they could challenge any voter based on a lack of identification.

The unit herein, consisting of approximately 115 eligible voters, was not a large bargaining unit. Only 88 employees voted in the election. This case is distinguishable from the large and complex cases cited by the parties where the Courts or the Board found additional voter identification to be required.

Certain factors considered by the Fifth Circuit Court of Appeals in *Avondale Industries, Inc. v. N.L.R.B.* 180 F.3d 633 (5th Cir. 1999) and persuading the Court to direct a new election with enhanced voter identification safeguards are not present herein. There were nearly 4,000 employees who voted and 850 challenged ballots in *Avondale* compared to only 88 employees who voted with 6 challenged ballots herein. Unlike the instant case, in *Avondale* it was known in advance of the election there would be a substantial number of challenged ballots. In *Avondale* the observers were unable to be personally acquainted with the voters, whereas every voter herein was known, at least by one of the observers, to be whom they identified themselves to be. The Court in *Avondale* noted "[i]t is undisputed that most of the observers did not know the hundreds of employees who appeared during their stints at each of the voting zones." Herein only 88 voted at one voting location. Unlike in *Avondale* the record herein does not establish any improper campaign tactics or that the election was "bitter" "hostile" "high profile" or "hotly-contested." The election results herein were close; however, there is no indication if that had been the only factor in *Avondale* the Court would have

ordered a new election. In *Monfort, Inc. 318 NLRB 209 (1995)* the Board utilized employee identification cards to assist in voter identification but the bargaining unit there consisted of 1,500 compared to 115 herein. In *Newport News Shipbuilding 239 NLRB 82 (1978)* the Board utilized the last four digits of employee social security numbers to help identify voters; however the bargaining unit there consisted of 19,000 with 65 voting locations. Approximately 85 of the 115 eligible bargaining unit employees herein worked on the main campus of the Employer. Even though there are two group homes as well as a Transition House and a Crises Shelter located away from the main campus in greater Charlotte, North Carolina, Employer President Bass testified he thought most of the bargaining unit employees would know a fair number of those working at the other locations but perhaps no one would know all of them. Simply stated this was not a large or complex bargaining unit warranting additional voter identification procedures and most employees knew their fellow employees.

I am persuaded the self identification procedure utilized by the Board Agent herein involving this relatively small bargaining unit that had few separate locations was appropriate and did not call into question the validity or fairness of the election.

The Employer's objections viewed separately or in totality, do not raise reasonable doubt as to the fairness or validity of the election.

CONCLUSIONS

Based upon the above, I recommend that the Employer's objections be overruled.

Dated, Washington, DC

William N. Cates
Associate Chief Judge